

May 28, 2010

Climate Change Update

Federal regulatory and legislative initiatives regarding climate change continue to roll out. During the month of May, EPA moved forward with rules regulating greenhouse gas (GHG) emissions and Senators John Kerry and Joseph Lieberman unveiled the proposed "American Power Act," a renewed effort at national climate change legislation. Below is a summary of these and other significant developments.

EPA REGULATORY DEVELOPMENTS

EPA Finalizes Greenhouse Gas Emissions Rule for Large Stationary Sources

On May 13, 2010, the U.S. Environmental Protection Agency (EPA) announced the final Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (the "Tailoring Rule"), which limits GHG emissions from stationary sources under the Clean Air Act (CAA). The Tailoring Rule affects new sources and modifications to existing sources, when either results in GHG emissions exceeding the Tailoring Rule's thresholds. The goal is the reduction of GHG emissions from the largest sources. The first phase of the Tailoring Rule, which takes effect on January 2, 2011, does not impact either small businesses or farms. The GHG emissions limits on new cars under the Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards (the "Clean Cars Rule") are also effective as of January 2, 2011.

The final Tailoring Rule increases the thresholds that were set forth in the EPA's September 2009 tailoring proposal. This original proposal sought to require permits from facilities that released more than 25,000 tons of GHGs annually. The Tailoring Rule as promulgated will be phased in in three parts. The first phase will run from January 2, 2011 to June 30, 2011, and impact only sources already subject to Prevention of Significant Deterioration (PSD) and/or Title V permitting requirements for other non-GHG pollutants. For newly constructed sources, GHG emissions of 75,000 tons per year (tpy) total will trigger the Best Available Control Technology (BACT) requirement for GHG emissions, and for modifications, a 75,000 tpy increase to existing GHG emissions will trigger the requirement. In the second phase, from July 1, 2011 to June 30, 2013, new sources emitting a total of 100,000 tpy or more of GHGs and modifications to existing sources that cause a 75,000 tpy or more increase of GHG emissions will need PSD permits as a consequence solely of their GHG emissions. Also, any facility emitting 100,000 tpy or more of GHGs will require a Title V operating permit. According to EPA, with this threshold, about 550 facilities will have to obtain a Title V permit for the first time; 15,000 affected facilities already have Title V operating permits.

During the third phase of the Tailoring Rule, EPA must pursue another rulemaking to address additional GHG emissions permitting requirements. That rulemaking is to conclude by July 1, 2012, and take effect July 1, 2013. EPA will consider whether to require permits for sources emitting more than 50,000 tpy of GHGs and exclude permanently certain small sources from GHG permitting requirements. It may also consider whether and how to streamline permitting burdens. While many more sources could be affected by this phase of the rule, according to EPA, permits for sources emitting less than 50,000 tpy of GHGs will not be required until at least April 30, 2016.

The six regulated GHGs will be measured in terms of their carbon dioxide equivalent (CO₂e); the rationale is that different gases have different global warming potential. The regulated gases are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆).

There is potential for a legal challenge to the final Tailoring Rule. Petitions for judicial review of EPA's "endangerment finding," the legal basis for regulation of GHGs under the Clean Air Act, are currently pending before the United States Court of Appeals for the District of Columbia Circuit. If these petitions are successful, there will no longer be a basis for EPA's asserted authority to regulate GHG mobile source emissions under the Clean Cars Rule and GHG stationary source emissions under the Tailoring Rule.

The Tailoring Rule for stationary source GHG emissions is available [here](#).

The Clean Cars Rule is available [here](#).

Expansion of Mandatory Reporting Under the Greenhouse Gas Rule

EPA is developing rules that would extend the mandatory reporting requirement for greenhouse gases to encompass industrial landfills, wastewater treatment facilities, underground coal mines, and magnesium production facilities. The existing mandatory GHG reporting rule, finalized on September 22, 2009, affects 31 industry sectors, which are the source of approximately 85% of U.S. GHG emissions, according to EPA. The anticipated proposal, as well as proposed rules formally announced by EPA in March 2010 for three additional sectors - oil and gas, carbon dioxide (CO₂) injection and sequestration facilities, and fluorinated gases - builds on the 2009 rule.

[Click here](#) to view Day Pitney's Climate Change Alert discussing the Mandatory GHG Reporting Rule.

CONGRESSIONAL DEVELOPMENTS

Kerry-Lieberman Climate Change Bill Introduced

Whether and how fast Congress will adopt climate legislation remains uncertain. On May 12, 2010, Senators John Kerry and Joseph Lieberman released their federal energy bill, known as the American Power Act. The bill would create a cap-and-trade system for global warming pollutants, and it seeks to reduce incrementally emissions of these pollutants to 17% of 2005 levels by 2050. The bill encourages nuclear power generation, supports development of renewable energy and energy efficiency measures, and creates a national strategy for carbon capture and sequestration.

The Kerry-Lieberman bill is similar in a number of respects to H.R. 2454, the American Clean Energy and Security Act (ACES), passed by the House in June 2009. Both bills set almost identical emissions reduction targets and include a phase-in plan for cap-and-trade programs with start dates that vary by industry sector. Both bills would also preempt EPA's regulation of GHG emissions from stationary sources in PSD and Title V permits in instances where GHG emissions were the sole pollutants triggering the permit requirement. They would also preempt EPA from establishing National Ambient Air Quality Standards (NAAQS) for GHGs or new source performance standards for sources subject to emissions caps. There are important differences between the bills as well. For instance, under the Senate bill, large industrial sources would be subject to GHG regulation in 2016, two years later than under the House proposal. The Kerry-Lieberman bill, in contrast to the House bill, does not call for a national renewable energy standard. Also missing from the Kerry-Lieberman bill are several provisions in the House bill regarding energy efficiency initiatives. With respect to state cap-and-trade programs, the Kerry-Lieberman bill would permanently preempt state cap-and-trade programs, while the House bill would suspend such state programs from 2012 to 2017 but then allow parallel programs.

The Kerry-Lieberman bill is still in draft form and is intended to serve as a catalyst for further negotiation in the Senate. Prospects for passage this year of a climate change bill in the Senate remain uncertain.

The Kerry-Lieberman bill is available [here](#).

Efforts to Reverse Endangerment Findings

Senator Lisa Murkowski is seeking a Senate vote on her Resolution of Disapproval of EPA's findings that GHG emissions endanger public health and welfare. Senate parliamentary procedure would have required that such a vote take place by June 7, but pursuant to an agreement between Senators Murkowski and Reid, the majority leader, the vote is expected to take place on June 10. The resolution, if passed by both chambers of Congress and signed by President Obama, would reverse EPA's finding, which is the authority for EPA's regulation of GHG emissions under the Clean Air Act, and prevent EPA from taking any similar actions to regulate GHGs absent explicit Congressional authorization to do so. The resolution is one of several pending in Congress that would prohibit federal agencies from taking administrative action to address climate change through GHG regulation without express statutory authorization.

The resolution disapproving EPA's finding is available [here](#).

Click [here](#) to view Day Pitney's December 11, 2009, Alert about EPA's Endangerment Finding.